88-1575

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MAGGIE ADAMS, formerly known as
MAGGIE JO KOZA,
Petitioner,

v.

THE STATE OF NEVADA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW:

I. Whether the Nevada Supreme Court has correctly applied this Court's standards for finding harmless error in capital cases, as outlined most recently in Satterwhite v. Texas, 486 U.S.___, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), or whether Nevada's "sufficient other evidence test" is constitutionally adequate in a capital case as a remedy where the death penalty is not ultimately imposed;

II. Whether In Reference To the Federal Wiretap Statutes this Court should resolve the conflict between circuits in Watkins v. L.M. Berry & Company, 704 F.2d 577 (11th Cir. 1983)(personal telephone call may not be intercepted in the

ordinary course of business) and United States v. Axselle, 604 F.2d 1330 (10th Cir. 1979)(motel clerk listened for three to five minutes after he inadvertently overheard an "interesting comment") and United States v. Savage, 564 F.2d 728 (5th Cir. 1977)(motel switchboard operator inadvertently overheard ten seconds of private conversation).

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IN THE
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No. _____

MAGGIE ADAMS, formerly known
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v.

THE STATE OF NEVADA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEVADA

The petitioner, Maggie Jo Adams, by and through her attorney, Atmore L. Baggot, asks that a Writ of Certiorari issue to review the judgment of the Nevada Supreme Court in this matter.

OPINIONS BELOW AND STATEMENT OF JURISDICTION

The decision of the Nevada Supreme Court from which the certiorari is sought was not reported but was entered on June 24, 1988. It is attached as Appendix "C". An Order denying rehearing was entered by the Nevada Supreme Court on December 8, 1988, and is attached as Appendix "D". The applicable statutory provision conferring jurisdiction on this Court is 28 U.S.C. §1254(1). Time for filing this Petition has been extended under Supreme Court Rule 33.7.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This matter concerns the Fourth and Sixth Amendments to the Constitution and the Federal Wiretap Statute (18 U.S.C. §2515) which state:

United States Constitution.

Fourth Amendment: The right of the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons of things to be seized.

Fifth Amendment: No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Federal Wiretap Statute:

18 U.S.C. §2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be

received in evidence in any trial, hearing, or other proceedings in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United states, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter (18 USCS §§2510 et seq.).

1. Except as otherwise specifically provided in this chapter [18 USCS §§2510 et seq.] any person who-

a) willfully intercepts, endeavors to intercept, or procures any other person to intercept, any wire or oral communication;

b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when-

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

d)willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more that $10,000 or imprisoned not more than five years, or both.

2(a)(i) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept,

disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: Provided, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

STATEMENT OF THE CASE:

Shortly after midnight on October 25, 1980, the body of a taxi cab driver was found close to his taxicab which had been driven off the pavement in a remote area outside of Las Vegas. Police were able to remove several latent finger prints from the cab and to determine that the driver had been working the Las Vegas Strip, and that his last fare had been from the Tropicana Hotel to where the cab was found. However, the Police were unable to determine who was responsible for the killing and had no suspects.

Approximately eleven (11) days later on November 5, 1980, Las Vegas Police received a phone call from a desk clerk on duty in a motel approximately one block east of the Tropicana Hotel. The desk clerk related that he had inadvertently overheard a portion of a telephone conversation of a man in Room 359 and an outside female caller. He continued to listen and heard the following:

> Female: Do you have your gun?
> Male: Yes, I have mine, do you have yours?
> Female: Yes, I have mine in my purse, I am over here now, and here is what we will do. On the way over, I will set in the back seat of the car; and when we get to the rear of the motel I will get the drop on them.
> Male: Be careful, there are two of them.
> Female: Don't worry, if they try anything I will blow their brains out. I will have them toot the horn, and that will be your signal to come around and get in the car.
>
> (The foregoing appears in Koza v. State 100 Nev. 245, 681 P.2d 44 (1984).

Suspecting that a robbery might soon occur on the motel premises the police commenced surveillance of the room identified by the desk clerk. After observing individuals entering and leaving the room the officers knocked on the door and announced that they were police officers. From inside the room they heard the sound of the slide action of an automatic pistol. Approximately one minute later Koza's wife appeared. The officers searched her but found no weapons. She was handcuffed and arrested while the officers entered the room.

Police found Joseph Koza with a small holster clipped to his waistband but no gun. They arrested him and he was charged with conspiracy to commit robbery. After the arrest the officers noticed a portion of a chrome object hidden between the mattress and box spring and discovered a Raven .25 caliber automatic handgun with a live round in its chamber which fit the

Koza holster. Two other guns were also found. It should be noted that no robbery took place at the motel on the date of the arrest, November 5, 1980.

Petitioner, Maggie Adams, formerly Maggie Koza, was interrogated the following morning, November 6, 1980. She told detectives that she did not want to talk to them, but instead wanted to talk to attorney Mr. Momot. The following day, November 7, 1980, the detectives took Maggie back to the Interrogation Room in the Detective Bureau ostensibly for a rebooking. The detectives admitted it was not necessary to the "re-booking" that they return Maggie to the Interrogation Room. There was additional testimony that Maggie said she did not want to go with the detectives. The trial court expressly found that there was "No doubt that a jail matron had told Maggie that she had to go with the detectives".

Once in the Interrogation Room the detectives told Maggie that in addition to being charged with conspiracy to commit robbery at the motel on November 5th, she was also being charged with the murder and robbery of the taxicab driver on October 25th. She was read her rights, but refused to sign a rights waiver. The detectives then informed her that ballistics tests had revealed that the gun found in the motel room positively matched the bullet removed from the victim. In addition, the detectives informed her that her fingerprints had been identified on the victim's taxi. At that point, Maggie made the incriminating statements which were the subject of her first appeal to the Nevada Supreme Court. See Koza v. State, 102 Nev. 181, 718 P.2d 671 (1986).

In her statement Maggie informed the detectives that on the night that the body of the taxicab driver was located, namely, October 25, 1980, that she had been

hitchhiking, and that unknown persons picked up both her and her husband, Joseph, to drive them back to the Tropicana Hotel. Having acquired the ride information, Las Vegas Police advertised in the local paper for the driver of the pick-up truck to come forward and assist in the prosecution. On November 12th, three individuals named David Berry, Pat Jones and Al Smith identified Joseph Koza were discovered as a result of the newspaper ad and provided the general description of the petitioner. The stated purpose of the ad was to assist the prosecution in bolstering its case against the Kozas. (See attached Nevada Supreme Court Opinion, 6/24/88, page 3). The significance of the testimony of these witness located through petitioner's confession is described by the Nevada Supreme Court as:

> The testimony placing Koza near the scene of the crime at

> the approximate time of its occurrence...is especially damaging to Koza's position. We conclude, that there is substantial evidence in the record to support the verdict of the jury and therefore will not overturn in on Appeal.
> 681 P.2d at 47.

Both Joseph and Maggie Koza were charged and tried jointly. The conviction of Joseph Koza was affirmed in Koza vs. State, 100 Nev. 245, 681 P.2d 44 (1984). Maggie's conviction was reversed in Maggie Jo Koza v. State of Nevada, 102 Nev. 181, 718 P.2d 671 (1986) on the ground that her statements to the detectives were obtained in violation of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and Michigan v. Jackson, __ U.S._, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). In Maggie's case the Nevada Supreme Court ruled:

> If there could have been any doubt about the meaning of Edwards, such a doubt was removed by the reaffirmation of the Edwards ruling in Michigan. There is no way in which this

Court can hold the interrogation here to be valid.
718 P.2d at 674.

After her conviction was reversed, Maggie was re-tried, and again convicted. Although the confession itself was suppressed in her second trial, the information provided in the illegally obtained testimony was not, namely, the witnesses in the pick-up truck were admitted over objection. Her second Appeal was decided on June 24, 1988. The Nevada Supreme Court affirmed as follows:

> The District Attorney's Office acquired the ride information from Maggie Jo Koza's illegally obtained confession. Even if the testimony was "fruit of the poisonous tree" its admission was not reversible error. There was sufficient other evidence to establish Maggie Jo Koza's guilt with respect to the crime charged. See Sechrest vs. State, 101 Nev. 360, 705 P.2d 625 (1985). Her fingerprints were found on the bumper of the taxi cabs driven by the murdered victim. The murder weapon was found in the apartment belonging to Maggie Jo and Joseph Koza.
> See Appendix "C-47,48"

REASONS FOR GRANTING THE PETITION

I. THE NEVADA STANDARD OF "SUFFICIENT OTHER EVIDENCE" IS A CONSTITUTIONALLY INADEQUATE STANDARD IN A CAPITAL CASE UNDER RECENT DECISIONS OF THIS COURT, PARTICULARLY SATTERWHITE v. TEXAS, 108 S.CT 1792 (1988).

In the present case the Nevada Supreme Court applied its own established precedent as articulated in its prior case of Sechrest v. State, 101 Nev. 360, 705 P.2d 629 (1985). The Nevada standard of review for determining the effect of the state's use of the fruits of an illegally obtained confession is as follows: "Even without the confession there is sufficient other evidence of...guilt to support his conviction". 705 P.2d at 629. This standard of "sufficient other evidence" to establish guilt is contrary to recent decisions of this Court such as

Satterwhite vs. Texas, 108 S.Ct. 1792 (1988).

Satterwhite involved a state's use of testimony obtained in violation of the accused's Sixth Amendment of Right to Counsel. In stating that the test fortestimony obtained in violation of the right to counsel is the Harmless Error Standard of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 305 (1969). This Court stated:

> The question however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the state has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained". Chapman, 386 U.S., at 24, 87 S.Ct. at 828.

In its ccnclusion in Satterwhite this Court restated the same test in the following words:

> ...we find it impossible to say beyond a reasonable doubt that

> Dr. Grigson's expert testimony on the issue of Satterwhite's future dangerousness did not influence the sentencing jury.
> 108 S.Ct. at 1799.

The Nevada Supreme Court has already recognized the substantiality of the testimony obtained as a result of the illegal confession of petitioner. In thecompanion case of Joseph Koza v.State of Nevada, 100 Nev. 245, 681 P.2d 44 (1984) which upheld the conviction of the husband, Joseph Koza, the Nevada Supreme Court said:

> ...the testimony placing Koza near the scene of the crime at the approximate time of its occurrence and the evidence proving that the gun found under Koza's mattress, which fit Koza's holster, was the murder weapon are especially damaging to Koza's position. We conclude that there is substantial evidence in the record to support the verdict of the jury and therefore will not overturn it on Appeal.
> 681 P.2d at 47.

The testimony referrered to above is precisely the testimony which is the fruit of petitioner's illegally obtained

confession. The evidence as to Maggie Koza was less compelling than that in the case against her husband. The State proceeded on alternative theories of aiding and abetting and the felony-murder rule in order to bolster its position that Maggiehad participated in the crime although she had not pulled the trigger. It is highly damaging to Maggie to be placed at the scene of the crime at the approximate time of its occurrence which is what the State gained by the use ofthe witnesses discovered through use of the illegally obtained confession. It is impossible to say that the testimony of the three people who offered the ride did not contribute or influence the jury in convicting the petitioner of the crime charge, even though under the Nevada standard there might be "substantial other evidence" to support the conviction.

In the recent case of Pope vs. Illinois, 108 S.Ct. 1918 (1987), this

Court interpreted Rose vs. Clark, 478 U.S.__, 106 S.Ct. 3101, 92 L.Ed.2d 460(1986) as follows:

> ...Rose, supra, is not to say that the reviewing court can retrace the jury's deliberative processes, but that the factsfound by jury were such, that it is clear beyond a reasonable doubt, that if the jury had not heard the impermissible instruction its verdict would have been the same.
> 107 S.Ct. at 1922, footnote 6.

In the present case the fact that the defendant's fingerprints were found on a public taxicab would not necessarily place her near that cab at the time and/or place of the crime. Nor would the fact that the gun was found in her motel room implicate her in view of the finding of the holster which was being worn by her husband. Indeed, the State's very purpose in utilizing the fruit of the illegally obtained confession was "to assist the prosecution in bolstering its case against the Kozas". (See Appendix "C-47")

In United States vs. Morrison, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981) the Court discussed extension ofthe reach of the exclusionary rule as follows:

> Cases involving Sixth Amendment deprivations are subject to the general rule thatremedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. 101 S.Ct. at 667.

The rule of Edwards vs. Arizona, supra, has been described as a "rigid rule" and "prophylatic safeguard". Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 492, 83 L.Ed.2d 488 (1984); Fare v. Michael C., 442 U.S. 707, 719, 99 S.Ct. 2560, 2569, 61 L.Ed.2d 197 (1979).

It should also be noted that in the present case the violation by the police was a denial of right to counsel and not merely a Fourth Amendment question of the illegal seizure of tangible evidence. The case of United States v. Ceccolini, 432

U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978) involved the discovery of a live witness resulting from an illegal search and seizure. The Court noted that the doctrine of "Fruit of the Poisonous Tree" as phrased in Wong Son v. United States,371 U.S. 471, 83 S.Ct. 487, 9 L Ed.2d 441 (1963) is not absolute, but that application of the rule is restricted to those areas where "its remedial objectives are thought most aesthetically served", quoting from United States v. Calandra, 414 U.S. 338, 348, 93 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974).

In the present case there is no attenuation between the illegal interrogation and the discovery of the live witness. The live witnesses were discovered solely and directly through the improperly obtained confession of the petitioner and an ad placed in the Las Vegas paper. The time frame is very narrow and there is no other way that the police

would every have discovered these witnesses other than or "but for" the illegally obtained statements of the petitioner.

Recently, the Arizona Supreme Court in State Of Arizona v. Bravo, 158 Ariz. 364, 762 P.2d 1318 (1988) applied Ceccolini where "the identity of the witness was completely unknown to the police before the misconduct...(and) the unlawful interrogation led directly to the witness...and he would not otherwise have been discovered". 762 P.2d at 1329. In excluding the witness as "fruit of the poisonous tree" the Arizona Supreme Court quoted a passage from Ceccolini and said:

> The police in this case did exactly what the Supreme Court suggested would have been improper for the officer involved in Ceccolini to do. They were attempting to find witnesses when they violated the defendant's Miranda rights.
> The stated philosophy of the detectives was to ignore the requirements of Miranda and to

> let the courts sort it all out later. The state is ill-served by such disregard for the law, and this case and the resulting reversal is a prime example of such ill-service. The factor of police motivation strongly militates in favor of exclusion. 762 P.2d at 1328.

Also in conflict with petitioner's case is United States v. Scios, 590 F.2d561 (D.C. 1978)(En Banc) where an FBI agent unlawfully rifled through defendant's file folder and removed informaion which revealed a material state's witness. The discovery of the live witness testimony "was not the product of an improbable, unforeseeable coincidence. It was good police work, but a straightforward exploration of the leads in the illegally seized file". 590 F.2d at 961. Accordingly, the live witness testimony was suppressed.

Another authority in conflict with the Nevada Supreme Court'sdecision in the present case is Commonwealth v. Lahti,398 Mass. 829, 501 N.E.2d 511 (1986), cert.

denied, __ U.S. __, 107 S.Ct. 1895, 95 L.Ed.2d 502 (1987), where live witness testimony was excluded because: "the unlawful interrogation led directly to the witness...and he would not otherwise havebeen discovered ". 762 P.2d at 1329.

Finally, it should be noted that thismatter does not deal merely with a Fourth Amendment violation. It involves a state prosecutor gaining an advantage of "substantial evidence" (Koza, supra, 681 P.2d at 47) through the deliberate denial of the Sixth Amendment right to counsel contrary to the Edwards "bright-line rule to safeguard pre-existing rights". Solem v. Stumes, 465 U.S. 638, 646, 104 S.Ct. 1338, 1343, 79 L Ed.2d 579 (1984).

This Court has distinguished and referred to "the unique role the lawyer plays in the adversary system of criminal justice in this country..., the lawyer is the one person to whom society looks as the protector of the legal rights of that

person and his dealings with the police and the courts". Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 2569, 61 L.Ed.2d 197 (1979). There, the court referred to "this pivotal role of legal counsel thatjustifies the per se rule established in Miranda, and that distinguishes therequest for counsel from the request for a probation officer, clergyman, or a close friend". 99 S.Ct. at 2570.

If Edwards is to achieve its intended effect this Court must now take the next step and declare that a state which deliberately violates Edwards may not obtain substantial benefits from its violation by the use of the fruits of that violation, even if thosefruits are comprised of the live testimony of otherwise qualified witnesses.

THEREFORE, the court should grant a Writ of Certiorari to resolve the conflict between case authorities, to bring the

Nevada rule into line with this Court's own decisions, and to make Edwards a reality.

II. THE FEDERAL WIRETAPPING STATUTE, TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, 18 U.S.C. §§2510-2520 (1976), PROHIBITS THE USE IN EVIDENCE OF ANY ORAL COMMUNICATIONS UNLAWFULLY INTERCEPTED.

The Wiretapping Statute (18 U.S.C. §2515) states:

> ...whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding, in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

In the present case, a telephone conversation was intercepted by the manager of a motel. It is established that the conduct violates the federal wiretap statute "unless it comes within anexemption "specifically provided in TitleIII". Watkins v. L.M. Berry & Company, 704 F.2d 577, 580 (11th Cir. 1983). In Watkins, an employer monitored a personal telephone call received by an employee. The issue, as decided by the 11th Circuit, was "whether the employer listened to the telephone call beyond what was necessary to determine that thecall was personal".

The Watkins case is referred to in Koza v. State, 681 P.2d 44, 48, as being in conflict and disapproving the prior Tenth Circuit decision in United States v. Axselle, 604 F.2d 1330 (10th Cir.1979) where a motel clerk listened for three to five minutes after inadvertently

overhearing an "interesting comment". The Watkins decision also conflicts with U.S. v. Savage, 564 F.2d 728 (5th Cir. 1977), in which a motel switchboard operator inadvertently overheard ten seconds of conversation.

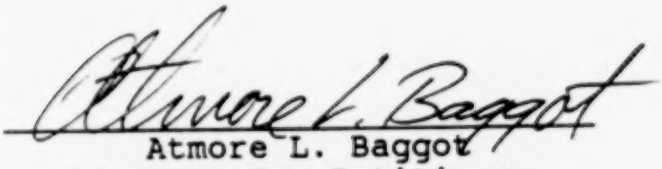
In the present case, the motel manager listened beyond the amount of timenecessary to determine the call was personal. He continued to deliberately intercept the oral communication and both the communication and the fruits thereof were introduced into evidence against the Petitioner.

THEREFORE, this court should grant certiorari to resolve the conflict between the Watkins case issued by the Eleventh Circuit and the Axselle and Savage cases issued by the Tenth and Fifth Circuits.

CONCLUSION

For the reasons stated, it is respectfully requested that the Petition For Writ Of Certiorari to the Nevada Supreme Court be granted.

DATED this 14th day of March, 1989.



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Joseph Edward KOZA, Appellant,

v.

The STATE of Nevada, Respondent.

No. 14243.

Supreme Court of Nevada.

April 25, 1984.

OPINION

PER CURIAM:

A jury convicted Joseph Edward Koza of first degree murder with the use of a deadly weapon and returned a verdict of life imprisonment without the possibility of parole on the murder count. The district court sentenced Koza to fifteen years imprisonment on the robbery court. The district court also imposed additional enhancement penalties of fifteen years and life imprisonment without the possibility of parole for the use of a deadly weapon in the commission of the crimes. The sentences are to run consecutively. Our review of the record convinces us that

Koza was fairly tried, convicted and sentenced. We therefore affirm.

Shortly after midnight on October 25, 1980, a man driving home from work spotted a taxicab which had been driven off the pavement and into a large bush. Behind the cab, which was in a remote area on the outskirts of Las Vegas near Sunset Road, the man found a body on the ground.

An autopsy revealed that the victim, The cab's driver, died of two .25 caliber gunshot wounds to the back of the head. The cab company supervisor also discovered a .25 caliber shell casing under the back seat of the cab. Although the cabdriver's trip sheet reported $76.85 in fares for the evening, no money was found on his body or in the cab's safe. The cab's meter was still running when police arrived. Several latent fingerprints were recovered from the cab.

Immediately prior to his death, the cabdriver was on duty and following his

normal routine of "working the Las Vegas Strip," instead of taking dispatch calls. He picked up four passengers at the Riviera Hotel at 9:52 p.m. and left them at the Tropicana Hotel. His trip sheet's final entry noted that at 10:02 p.m. he picked up two persons. Contrary to routine practice, the cabdriver did not indicate where the persons were picked up or where they wanted to go. Subsequent to the police investigation, the cab company supervisor, using information from the abandoned cab's running meter and from three alternative routes (each driven on a Friday at 10:00 p.m.) from the Tropicana Hotel to where the cab was found, calculated that the cabdriver had arrived at the scene at approximately 10:15 p.m. the night he was killed.

The evening of the killing, David Berry was driving his truck on Sunset Road with his friend Albert Smith and their girlfriends. The hour was sometime between

10:15 p.m. and 10:30 p.m. Berry passed a man and a woman walking along at a point approximately one-half mile from where the body was found. Seeing the man put his thumb out, Berry backed up to give them a ride. Smith rolled down the passenger window, turned his head to look at the man and asked him if they wanted a ride. The man, who stood about five feet from Smith, replied affirmatively and indicated that they were going to the "the Tropicana." There were no streetlights in that area, but Smith saw the man's face from the illumination provided by Berry's truck lights and by the lights of an approaching car. When Berry later let the hitchhikers out, he "got a good look" at the man as he helped the woman out of the truck. There were streetlights in the area where the two disembarked.

On November 12, 1980, Berry and Smith and their girlfriends met with police detectives. Berry was separated from the

others and interviewed. After he briefly described the hitchhiker, police conducted a photo lineup containing six photographs. Berry "positively" identified the picture of Koza as the hitchhiker. The procedure was repeated for Smith, who also identified Koza's photograph. Berry and Smith later identified Koza at preliminary hearings and at trial. Neither Berry nor Smith could identify the woman hitchhiker, but their general descriptions matched that of Koza's wife.

Prior to being charged with the instant crimes, Koza and his wife had been arrested on unrelated charges at motel where they were registered under a false name. Their registration card listed no motor vehicle and the motel clerk testified that he had never seen Koza or his wife in a private car, only in taxicabs. Koza and his wife had stayed at the motel for over two months and had paid their rent daily in cash. The motel is

approximately one block east of the Tropicana Hotel.

The arrests were precipitated by the motel desk clerk's inadvertent overhearing of a portion of a telephone conversation between a man in room 359 and an outside female caller. The caller inquired, "Do you have your gun?" The desk clerk, who was also the motel's manager, listened one of two minutes thereafter for security reasons and heard the following:

Female: Do you have you gun?

Male: Yes, I have mine; do you have yours?

Female: Yes, I have mine in my purse. I am over here now, and here is what we will do. On the way over, I will sit in the back seat of the car; and when we get to the rear of the hotel I will get the drop on them.

Male: Be careful, there are two of them.

Female: Don't worry. If they try anything I will blow their brains out. I will have him toot the horn, and that will be your signal to come around and get into the car.

Suspecting a robbery might soon occur on the premises, the desk clerk called the motel owner and then the police.

Police officers arrived thirty to forty-five minutes later and commenced surveillance of room 359. During the next two hours, a man later identified as Koza twice left the room, went to the rear of the motel and returned. He appeared as if he was looking for someone. After a third trip to the front of the motel, he returned to the room with a woman later identified as Koza's wife. At that time the officers decided to investigate. Sergeant Schaub knocked on the door and announced they were police officers who wanted to speak with the occupants. Schaub then heard from inside the room the sound

of a slide action of an automatic pistol. Schaub immediately shouted to the other officers to take cover. He shouted to the occupants of room 359 that he know someone in the room had a gun and that unless everyone exited, police officers would come in shooting.

Approximately one minute later the door opened slightly and Koza's wife appeared. Schaub ordered her to come out; she did not. She asked what he wanted and said nobody else was inside. Schaub raised his gun and again ordered her to come out. She then exited through the narrowly opened door. The officers searched her, found no weapons, handcuffed and arrested her. Knowing that at least one man was still in the room, Schaub shouted that he knew someone else was inside and ordered him to come out. After one or two minutes, Koza emerged. Police found a small holster clipped to his pants' waistband, but no gun. The Kozas were arrested for

conspiracy to commit robbery.

Schaub and the other officer then entered the room and commenced a "protective sweep." No one was found in the main area on the room or in the bathroom. While returning to the main area, Schaub noticed one bed's mattress was not aligned with the box springs. He could see a portion of a chrome object hidden between the mattress and box springs. Bending down, he could see more of the object and "just knew" that it was a gun. Schaub lifted the mattress and confirmed that the object was a gun. It was a Raven .25 caliber automatic handgun with a live round in its chamber. Two other guns were also found. Only the Raven fit Koza's holster.

A firearms examiner conducted tests with the guns seized in Koza's room. He concluded, with "one hundred percent" certainty, that the bullets recovered during the cabdriver's autopsy and the

cartridge found in the cab were fired from the Raven pistol. The next day, fingerprint experts discovered that a latent palm print recovered from the fender of the victim's cab matched the palm print of Koza's wife.

An information jointly charged Koza and his wife with murder and robbery, both counts with the use of a deadly weapon. The jury found Koza guilty of first degree murder and robbery, both with the use of a deadly weapon. Although the state sought the death penalty, the jury concluded the penalty phase of the trial by returning a verdict for life imprisonment without the possibility of parole. Koza was sentenced to two consecutive life sentences without the possibility of parole for his conviction of first degree murder with the use of a deadly weapon and two consecutive fifteen year terms of imprisonment for his conviction of robbery with the use of a deadly weapon. Koza now appeals from each

of his convictions and sentences.

Koza first contends that the record does not contain sufficient evidence for a rational trier of fact to be convinced beyond a reasonable doubt of his guilt. The relevant inquiry for this Court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original); Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981). The testimony placing Koza near the scene of the crime at the approximate time of its occurrence and the evidence proving that the gun found under Koza's mattress, which fit Koza's holster, was the murder weapon are especially damaging to Koza's position. We conclude that there is substantial evidence in the record to

support the verdict of the jury and therefore will not overturn it on appeal.

Koza next contends that the district court's refusal to suppress the photo lineup identifications violated his due process rights. Koza relies on Manson v. Brathwaite, 432 U.S. 98, S.Ct. 2243, 53 L.Ed.2d 140 (1977) for his contention that the suggestiveness of the photo lineup outweighed the reliability of Smith's and Berry's identifications. We have considered the manner in which the police conducted the photo lineup and have examined the six pictures displayed and conclude that the identification procedure was not "so impermissibly suggestive as to give rise to a very substantial likelihoodof irreparable misidentification." Id. at 105 n.8, 97 S.Ct. at 2248 n.8, quoting Simmon v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968). The district court, therefore, did not err by

refusing to suppress the photo lineup identifications.

Koza's third argument is that his arrest and the search of his motel room and seizure of evidence found therein were products of an unlawful interception of a private communication by wire. Koza maintains, as he did at a pretrial suppression hearing, that NRS 179.465(2) implicitly prohibited the motel desk clerk's disclosure of the contents of the overheard telephone conversation. More directly on point, however, is NRS 200.630 which explicitly prohibits disclosure and recognizes the same statutory exceptions listed in NRS 179.465(2).1 NRS 200.630(2) nevertheless creates an exception for persons engaged in the business of providing service and facilities for such communication where the interception is to operate the service or facilities. We construe this statute to include employees preforming hotel and motel switchboard

operations. Here, the district court at the suppression hearing specifically found that the desk clerk "inadvertently" plugged into the telephone conversation. Although conflicting evidence was presented regarding this factual issue, the district court's finding is supported by substantial evidence. We therefore will not disturb the finding on appeal. Morrison v. Rayen Investments, Inc., 97 Nev. 58,61, 624 P.2d 11,13 (1981). Because the motel was engaged in the business of providing telephone service and the desk clerk was operating the service when he inadvertently overheard part of Koza's conversation, we hold that the initial interception was not unlawful and, therefore, subject to disclosure at trial.The desk clerk's listening for one to two minutes thereafter was warranted by his reasonable apprehension that unlawful and life-threatening conduct was about to occur in his motel. See United States v.

Axselle, 604 F.2d 1330 (10th Cir. 1979) (motel clerk listened for three to five minutes after inadvertently overhearing an "interesting comment"); U.S. v. Savage, 564 F.2d 728 (5th Cir.1977) (motel switchboard operator inadvertently overheard ten seconds of conversation); but see Watkins v. L.M.Berry & Company, 704 F.2d 577 (11th Cir. 1983)(disapproving Axselle). We therefore conclude that the desk clerk lawfully communicated what he had overheard to law enforcement personnel and that such communication constituted probable cause for Koza's arrest. Admission of the desk clerk's testimony concerning the conversation overheard while eavesdropping was an appropriate exercise of the trial court's discretion.

Koza's fourth contention is that the warrantless search of his motel room was not justified by the "emergency doctrine." In Banks v. State, 94 Nev. 90, 575 P.2d 592 (1978), we explained the grounds for

making a warrantless search and seizure.

> Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, ... provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either [sic] life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discoverincriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize without warrant.

Id. at 97, 575 P.2d at 596, quoting E. Mascolo, The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment, 22 Buff.L.Rev. 419, 426-27 (1973). In the instant case, the officers were informed that an occupant in room 359 had been party to a conversation apparently planning an armed robbery and indicating that one of the callers was willing to kill in order to accomplish the robbery. The officers arrived at the motel thirty to forty-five minutes after the desk clerk's call, during which time a robbery could have occurred. Officer Schaub heard the sliding action of an automatic handgun after he had knocked and announced that police wanted to question the occupants. Both Koza and this wife acted suspiciously and delayed exiting the room. Despite the telephone conversation mentioning a gun, the sliding action of a gun which the officer heard and the empty

holster found clipped to Koza's belt, no gun was found on Koza or his wife. We agree with the district court's determination that under those circumstances the officers had reasonable grounds to believe that another accomplice might still be in the room and that an urgent need existed to preserve the life of a possible robbery victim or their own lives.

Koza next contends that the district court erred by denying his motion to suppress admission of the murder weapon, because the warrantless seizure of the partially visible gun from and under the mattress was not justified by the "plain view doctrine." The U.S. Supreme Court's latest pronouncement on the plain view doctrine is set forth in Texas v. Brown, 460 U.S. 730, 103, S.Ct. 1535, 75 L.Ed.2d 502 (1983). The Court in Brown initially listed the three requirements, set forth in Coolidge v. New Hampshire, 403 U.S

443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), for a warrantless seizure.

> First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Id., at 465-468, 91 S.Ct., at 2037-2039. Second, the officer must discover incriminating evidence "inadvertently," which is to say, he may not "know in advance the location of [certain] evidence and intend to seize it," relying on the plain view doctrine only as a pretext. Id., at 470, 91 S.Ct., at 2040. Finally, it must be "immediately apparent" to the police that the the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. Id., at 466, 91 S.Ct., at 2038. While the lower courts generally have applied the Coolidge plurality's discussion

of "plain view," it has never been expressly adopted by a majority of this Court.

103 S.Ct. at 1540.

The Court then discussed each requirement as it related to the seizure in Brown of a balloon containing heroin from the front seat of a car. The seizure was upheld.

The first element is apparently satisfied in the instant case. According to our prior analysis, the officers made a lawful initial intrusion into the hotel room and a justified "protective sweep" of the room. During that sweep, an officer saw the chrome object. Moreover, with regard to this first element, the Court stated that in light of private Fourth Amendment interests and legitimate governmental interests, "our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive

a suspicious object, they may seize it immediately." Id., at 1541 (emphasis added).

The second element requires the officers to discover the evidence "inadvertently." The Court explained that the requirement of inadvertence means that the officers may not know in advance the location of the evidence and intend to seize it, relying on the plain view doctrine only as a pretext. Here, there is no suggestion that the entry into room 359 was merely a pretext to seize the gun. As in Brown, the officers in the instant case did not know in advance of their investigation the location of any incriminating evidence or any particular object they might seize.

The third element requires that it may be "immediately apparent" to the officers that the object observed may be evidence of a crime, contraband, or otherwise subject to seizure. The Court

explained that the phrase "immediately apparent" should not be interpreted too strictly.

> Decisions by this Court since Coolidge indicate that the use of the phrase "immediately apparent" was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the "plain view" doctrine.
>
> Id. at 1542.

The Court then explained that it does not "view the 'immediately apparent' language of Coolidge as establishing any requirement that a police officer 'know' that certain items are contraband or evidence of a crime." Id. The Court concluded by stating that probable cause to associate the object with criminal activity creates a presumption that the

warrantless seizure of evidence in plain view is reasonable.

> [T]he rule, set forth in Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), [is] that "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." Id., at 587, 100 S.Ct., at 1380 (emphasis added).

The officer, after noticing the mattress was askew, spotted a piece of chrome metal under the mattress. Bending down, he could see a larger piece of it. Although he was not positive that the object was a gun, he testified that the object had the color of chrome of a gun. The officer was also aware that the occupants of the room may have planned an armed robbery, that he had heard the

sliding action of an automatic handgun, that Koza was wearing an empty holster and that no gun had been found on Koza or his wife. These facts support the district court's finding that the officers had probable cause to associate the chrome object with criminal activity, even without their "knowing" that it was a gun. This result corresponds with the High Court's statement that an officer may immediately seize evidence that he perceives as a "suspicious object." All three of the elements of the plain view doctrine are satisfied here, making lawful the seizure of the gun partially hidden under the mattress. Admission of the gun at trial, therefore, was not error.

Koza's final contention is that the district court erred by imposing consecutive enhanced penalties. First, Koza argues that his robbery and murder conviction merge, such that imposition of separate, additional penalties for his

robbery conviction violated the Double Jeopardy Clause. We have held, however that robbery and felony murder are two separate and distinct offences. Brimmage v. State, 93 Nev. 434, 443, 567 P.2d 54, 59-60 (1977). Each offence here, moreover, requires proof of an additional fact which the other does not. Compare NRS 200.010 and 200.380. The U.S. Supreme Court recently clarified its position with respect to cumulative punishment and the Double Jeopardy Clause in Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Id. at 687.

> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two

> statutes proscribe the "same" conduct . . ., a court's task of statutory construction is at an end and the prosecutor may seek and the trial court of jury may impose cumulative punishment under such statutes in a single trial.
>
> Id. at 679.

Here, separate and distinct statutes and offences are involved. We therefore conclude that Koza's sentencing did not violate the Double Jeopardy Clause.

We have considered that Koza's remaining contentions and conclude that they are without merit. Accordingly, we affirm the convictions of first degree murder and robbery, both with the use of a deadly weapon, together with the consecutive sentences imposing two life sentences without the possibility of parole and two fifteen-year terms of imprisonment.

END OF APPENDIX "A"

****

Maggie Jo KOZA, Appellant,

v.

The STATE of Nevada, Respondent.

No. 15799.

Supreme Court of Nevada.

May 1, 1986.

OPINION

PER CURIAM:

On November 5, 1980, Maggie and Joe Koza were arrested and charged with conspiracy to commit robbery. Subsequently they were also charged with the murder of a Las Vegas taxicab driver. Joe Koza was convicted of that murder and his conviction was upheld by a decision of this court in Koza v. State, 100 Nev. 245, 681 P.2d 44 (1984). This appeal concerns Maggie's murder conviction for her role in that slaying. The only issue we need address is the admissibility of Maggie's November 7, 1980, custodial statement.

At approximately 11:00 a.m., the

morning after her arrest, Maggie was taken from the Clark County Jail Annex to the Las Vegas Metropolitan Police Department's Detective Bureau. At that time she was advised of her rights as required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The detectives informed Maggie that she was a suspect in a murder unrelated to the one in the instant appeal. Maggie the asked that she be permitted to speak with her husband before discussing any murders. (At that time Joe Koza was in Southern Nevada Memorial Hospital being treated for drug withdrawal and a related infection.) The detectives ceased their questioning of Maggie and returned to the jail. They then proceeded to the hospital to interview Joe. Joe Koza told the detectives that he and Maggie each had a $500.00 per day heroin and cocaine habit. Joe refused to discuss the charges against him and requested to speak with attorney John

Momot. The detectives then returned to the detective bureau and tried unsuccessfully to contact Momot.

At approximately 2:00 p.m., the detectives brought Maggie back to the detective bureau and arranged a telephone conversation between the Kozas. After talking with her husband, Maggie told the detectives that she would also like to speak with attorney Momot. the detectives did not question her further but left her handcuffed to a rail in the interrogation room.

Momot arrived at the detective bureau at approximately 4:45 p.m. When Momot completed his conference with Maggie she was returned to the jail. Momot testified that he told the detectives that he did not know if he would be representing both the Kozas or only Joe, that no determination had been made but that for the time being her represented them both.

He also told the police that he had advised Mrs. Koza not to talk with them.

The detectives next spoke with Maggie on the following morning, November 7. The detectives first returned to the hospital to see Joe; however, he refused to speak to them. One of the detectives then telephoned Momot to "verify" that Koza was asserting his right to counsel. According to that detective Momot told him that they were not to question Joe and that he was not going to represent Maggie. Momot testified that he did not tell the detectives until several days later on November 11 that he would not be representing Maggie.

The detectives left the hospital and returned to the detective bureau where they once again brought Maggie to the interrogation room. The detectives claimed that Maggie was only returned to the interrogation room so that they could "rebook" her for the murder involved in

the instant appeal. After again advising her of her rights the detectives advised Maggie that they had evidence against her in connection with an additional murder and that she would be charged with that crime. They then proceeded to detail the evidence they claimed to have against her, namely, a palm print and the results of a ballistics test. According to one of the detectives, Maggie then stated: "I knew it was coming. I knew the horse was going to kick, and it hurts." She then spoke for about an hour, detailing three separate murders which she stated that she and her husband were responsible for. Maggie agreed to give a "formal" statement to the detectives but wanted to speak with her husband first. The detectives arranged for a phone call; however, after speaking with her husband, Maggie refused to talk to the police any further. She was then returned to her jail cell.

The district court ruled that the

statements made by Maggie were made after a voluntary, knowing and intelligent waiver of her fifth, sixth and fourteenth amendment rights. Such is not the case; so we reverse.

To determine whether there has been a proper waiver of right to counsel the court must separately focus on whether the waiver was voluntary and whether it was knowingly and intelligently made. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The United States Supreme Court has noted that the right to counsel is a "prime example of these rights requiring the special protection of the knowing and intelligent waiver standard." Edwards at 483, 101 S.Ct. at 1884, citing Schneckloth v. Bustmonte, 412 U.S. 218, 241, 93 S.Ct. 2041, 2055, 36 L.Ed.2d 854 (1973). See also Tomarchio v. State, 99 Nev. 572, 665 P.2d 804 (1983).

Once an accused has asserted the right to counsel, all interrogation must

cease until an attorney is present. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In Edwards, above, the United States Supreme Court held that it was "inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." 451 U.S. at 485, 101 S.Ct. at 1885. Waiver at that right is not established by showing that the accused was once again advised of his rights:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed

his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484, 485, 101 S.Ct.1884 (footnote omitted).

In a recent decision, Michigan v. Jackson, --- U.S.---, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), the United States Supreme Court discussed and applied the principle of Edwards v. Arizona to a situation in which two defendants requested appointment of counsel at separate arraignments. Before the defendants had had an opportunity to consult with counsel, police officers, after advising the defendants of their Miranda rights, questioned them and obtained written waivers of rights and confessions. The Supreme Court noted that

under Edwards once a suspect has invoked his right to counsel, the police may not initiate interrogation until counsel has been made available to the suspect.

Quoting Edwards, for the proposition that "the assertion of the right of counsel [is] a significant event," the Court in Michigan held that a waiver of rights was invalid where the defendant's assertion of the right to counsel had not been honored.

If there could have been any doubt about the meaning of Edwards such a doubt was removed by the reaffirmation and explanation of the Edwards ruling in Michigan. There is no way in which this court can hold the interrogation here to be valid.

The impermissible "further interrogation" prohibited by Edwards and Michigan need not, of course, take the form of a question and answer session. In Rhode Island v. Innis, 446 U.S. 291, 100

S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Supreme Court held that "techniques of persuasion" other than questioning may amount to interrogation.

> That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The later portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. The focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the

> underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of the police officers that they should have known were reasonably likely to elicit an incriminating response.
>
> 446 U.S. at 301,302, 100 S.Ct. at 1689 (emphasis partially supplied; footnotes omitted).

Maggie Koza was first interrogated on the morning of November 6. After talking with her husband, Maggie told the detectives that she did not want to talk

to them and wanted instead to talk to attorney Momot. The next day, November 7, the detectives took Maggie back to the interrogation room in the detective bureau. The detectives testified that this was not done to interrogate Maggie, but rather to "rebook" her on the murder charge. The detectives admitted that it was not necessary to the "rebooking" that they return Maggie to the interrogation room. There was testimony by others that Maggie said that she did not want to go with the detectives. The lower court expressly found that there was "no doubt" that a jail matron told Maggie that she had to go with the detectives.

Once Maggie was confined in the interrogation room the detectives read her her rights and told her that she was under arrest for murder. Maggie refused to sign a rights waiver. They then explained to her that ballistics tests on a gun found in the motel room where she was originally

arrested had revealed that the gun positively matched a bullet removed from the victim. They also told her that her fingerprints had been identified on the victim's taxi. At that point she made the incriminating statements which are the subject of this appeal.

It is immediately apparent that the detectives' contact with Maggie on the 7th of November constituted an interrogation within the meaning of Rhode Island v. Innis, above. Focusing in the perception of Maggie, rather than the intent of the police, as Innis requires, we see that Maggie was told that she had to go with the detectives. She was placed in an interrogation room where she had spent several hours the day before. The detectives not only told her she would be charged with murder. They also detailed part of the evidence against her, an act obviously beyond the necessities of a "rebooking." From the perspective of a

suspect in Maggie's position it would apparent that the detectives were hoping to elicit a statement. Certainly the officers should have known that their comments and actions were "reasonably likely to elicit an incriminating response." Innis at 301.

The Supreme Court of Delaware has very recently addressed a factual scenario similar to the one now at bar. In Wainwright v. State, 504 A.2d 1096 (1986), the defendant had invoked his right to counsel. Subsequently, while being booked, a police officer told the defendant that he was being charged because a co-defendant had made a statement implicating him. Forty-five minutes later the defendant made to the officers a statement which was used against him at his trial. The Delaware Supreme Court characterized the police officer's comments about the evidence against the defendant as "a gratuitous and totally unnecessary tactic

which was reasonably calculated to elicit a reaction from the defendant." 504 A.2d at 1103. The Delaware court went on to hold that "[a]ny attempt to 'spark' a statement in the absence of counsel through presentation of evidence will contaminate the waiver." 504 A.2d at 1103.

Because the instant interrogation and consequent statement resulted from police initiative and not at the instance of Maggie, Edwards v. Arizona, above, requires that her statements be suppressed if she had previously invoke her right to counsel. The lower court ruled that the Edwards doctrine does not apply to Maggie because she was not represented by counsel. That ruling was erroneous as Edwards does not turn on the employment of counsel.

There is no dispute that Maggie demanded to speak to attorney Momot on November 6. The testimony was conflicting as to when Momot told the detectives that

he was not going to represent Maggie; Momot said it was on the 11th and they said it was on the 7th, immediately before Maggie was brought back to the interrogation room. Two things are certain: Maggie was not informed on the 7th that Momot was not going to represent her, and although she had requested counsel, she was not provided another attorney until November 12, 1980.

As Edwards v. Arizona holds, it is no saving grace to a police-initiated interrogation that the accused is once again read his or her rights if the accused has already invoked the right to counsel. Once invoked, that right must be scrupulously honored. In the instant case it is apparent that Maggie invoked her right to counsel on the 6th. Attorney Momot expressly told the detectives that Maggie had been advised not to speak to them. Whether the detectives knew on the 7th that Momot would not be representing

Maggie is irrelevant because, either way, she had invoked her right to counsel and their actions violated that right. The withdrawal of particular counsel does not constitute a waiver of the right to counsel. As the United States Supreme Court stated in Maine v. Moulton, --- U.S. ---, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), "once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance." --- U.S. ---, 106 S.Ct. 484 (footnote omitted).

The burden of proving waiver by a preponderance of the evidence is on the state. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); Brimmage v. State, 93 Nev. 434, 567 P.2d

54 (1977). Because the finding of waiver in this case is clearly not supported by the record the lower court's refusal to suppress Maggie's November 7, 1980, statements was error and must be reversed. See Tomarchio v. State, above.

Accordingly, the judgement of the district court is reversed and this matter is remanded for further proceedings consistent with this opinion.

END OF APPENDIX "B"

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Maggie Jo KOZA, aka
Maggie Adams, Appellant,
v.
The STATE of Nevada, Respondent.

No. 18196.

Supreme Court of Nevada.

June 24, 1988.

OPINION

PER CURIAM:

Maggie Jo and Joseph Koza were

arrested and charge with conspiracy to commit robbery on November 5, 1980. Subsequently, they were also charged with the murder of a Las Vegas taxicab driver. Joseph Koza was convicted with the murder and his conviction was upheld by a decision of this court in Koza v. State, 100 Nev. 245, 681 P.2d 44 (1984). We reversed and remanded for retrial appellant Maggie Jo Koza's murder conviction on the basis of an illegally obtained confession. Koza v. State, 102 Nev. 181, 718 P.2d 671 (1986). Appellant. was retried in January, 1987. This appeal followed.

First, appellant contends that is was reversible error for the district court to allow respondent State of Nevada to proceed on alternative theories of prosecution. The Information did not reveal that the State intended to proceed on the theories of aiding and abetting and the felony murder doctrine. This court has

ruled that the charging document must give adequate notice to the defendant of the theories of prosecution. Barren v. State, 99 Nev. 661, 669 P.2d 725 (1983); Wright v. State, 101 Nev. 269, 701 P.2d 743 (1985); NRS 173.075. The defendants in Barren and Wright had no prior notice of the prosecutions' intent to proceed on alternative theories. This deprived them of the ability to properly defend against the accusations and denied them their fundamental rights. Wright. Maggie Jo Koza had ample notice of the State's intent and was not prejudiced by the inadequacy of the Information. The State proceeded against appellant on the alternative theories at her first trial. A Supplemental Information was filed revealing the prosecution's intent to proceed on those theories. Counsel for Koza filed a motion in the district court alleging inadequacy of the Information five months before the second trial. We do

not condone the State's failure to amend its Information to properly reveal the theories under which it intended to proceed, but due process was served by appellant's actual knowledge of the prosecution's intent to proceed on those theories. Where a defendant has not been prejudiced by the charging instrument's inadequacy the conviction will not be reversed. Laney v. State, 86 Nev. 173, 466 P.2d 666 (1970).

Second, Koza argues that the testimony of the people in the pickup truck who allegedly gave her and Joseph Koza a ride following the crime was "fruit of the poisonous tree" and admitted in error. Wong Sun v. United States, 371 U.S. 471 (1963). The witnesses were discovered as a result of a Las Vegas newspaper article requesting that the people with the pickup truck come forward to assist the prosecution in bolstering its case against the Kozas. The district attorney's

office acquired the ride information from Maggie Jo Koza's illegally obtained confession. Even if the testimony was "fruit of the poisonous tree" its admission was not reversible error. There was sufficient other evidence to establish Maggie Jo Koza's guilt with respect to the crime charged. See Sechrest v. State, 101 Nev. 360, 705 P.2d 626 (1985). Her fingerprints were found on the bumper on the taxicab driven by the murder victim. The murder weapon was found in the apartment belonging to Maggie Jo and Joseph Koza.

Finally, Koza raises issues related to the testimony of switchboard operator Joseph Ulrey. We disposed of the admissibility of this testimony in Koza v. State, 100 Nev. 245, 681 P.2d 44 (1984).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant Maggie Jo Koza has

failed to demonstrate error in this appeal. Accordingly, we affirm the judgment of the district court.

END OF APPENDIX "C"

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MAGGIE JO KOZA aka MAGGIE ADAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 18196

FILED
DEC 6 1988
CLERK OF SUPREME COURT
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Gunderson, C.

Steffen, J.

Young, J.

Springer, J.

Mowbray, J.

APPENDIX D-50

cc: Hon. Myron E. Leavitt, District Judge
Hon. Brian McKay, Attorney General
Hon. Rex Bell, District Attorney
Monte J. Morris
Loretta Bowman, Clerk

PROOF OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

ATMORE L. BAGGOT, being first duly sworn, upon his oath deposes and says: That he is a member of this Court, a citizen of the United States, and a resident of the county aforesaid; that he is over the age of eighteen years and is not a party to the within above-entitled action; that on the 15th day of March, 1989, he mailed the within Petition for Writ of Certiorari on the parties in said action, by placing a true copy thereof in an envelope, sealed, and postage thereon fully prepaid, in the United States mail at Phoenix, Arizona, addressed as follows:

Mr. Brian McKay
Nevada Attorney General
State Capitol
Carson City, Nevada

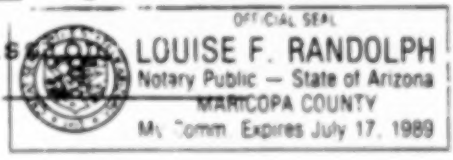
Mr. Rex Bell
Clark County District Attorney
200 South Third Street
Las Vegas, Nevada 89155

Atmore L. Baggot

Atmore L. Baggot

SUBSCRIBED AND SWORN TO before me this 15th day of March, 1989.

My commission expires:



Louise F. Randolph

Notary Public